

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)
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ORDER ON RECONSIDERATION

Adopted: August 18, 2003

Released: August 18, 2003

By the Commission:

1 On July 3, 2003, the Federal Communications Commission (Commission) released a Report and Order revising many of its telemarketing and facsimile advertising rules pursuant to the Telephone Consumer Protection Act of 1991 (TCPA).¹ Pursuant to Section 1.108 of the Commission's rules,² on our own motion, we issue this limited reconsideration of the *Report and Order* and extend, until January 1, 2005, the effective date of our determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements. We also extend, until January 1, 2005, the effective date of amended rule 47 C.F.R. § 64.1200(a)(3)(i).³

2. In the *Report and Order*, the Commission reversed its prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers.⁴ The Commission determined that the established business relationship would no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements.⁵ Instead, the Commission concluded that the recipient's express invitation or permission must be in writing and include the

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No 02-278, FCC 03-153, Report and Order (rel July 3, 2003) (*Report and Order*). A summary of this Report and Order was published in the Federal Register on July 25, 2003 (68 Fed. Reg. 44144).

² 47 C.F.R. § 1.108

³ Amended rule 47 C.F.R. § 64.1200(a)(3)(i) provides that "a facsimile advertisement is not 'unsolicited' if the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender."

⁴ *Report and Order* at para 189

⁵ *Id*

recipient's signature.⁶ The recipient must clearly indicate that he or she consents to receiving such faxed advertisements from the company to which permission is given, and must provide the individual's or business's fax number to which faxes may be sent.⁷

3 The American Society of Association Executives (ASAE) filed a petition for emergency clarification of the rules governing unsolicited facsimile advertisements as they apply to tax-exempt nonprofit organizations.⁸ In addition, ASAE filed a petition for stay of the unsolicited facsimile rules as they apply to tax-exempt nonprofits in the event the Commission is unable to clarify the rules prior to their effective date.⁹ Many of ASAE's members and other organizations have filed comments in support of ASAE's petitions.¹⁰ The National Association of Realtors also filed a Request for Emergency Stay of all of the facsimile advertisement rules, asking the Commission to grant a one-year stay of the recently adopted rules.¹¹ A Request for Stay of the amended rules concerning unsolicited facsimile advertising as they apply to the publishers of Requester Publications, along with a Request for Expedited Clarification of the unsolicited facsimile rules, were filed by Proximity Marketing.¹² In addition, a Request for Stay of the amended rules concerning unsolicited facsimile advertising as they apply to political action committees was filed by the National Association of Business Political Action Committees (NABPAC).¹³ The Chamber of Commerce of the United States *et al.* filed a Request for Stay of the amended rules that apply to unsolicited commercial faxes.¹⁴ The "Business Users Coalition" submitted a Petition for Emergency Stay of at least six months of the amended rules regarding unsolicited facsimile advertisements.¹⁵ A Petition for Stay of the rules governing the nature of "express permission" required to send advertisements by fax was filed by

⁶ Report and Order at para 191.

⁷ *Id.*

⁸ ASAE Petition for Emergency Clarification, filed July 25, 2003 (asking the Commission to issue, on an emergency basis, a clarification that unsolicited facsimile communications are not prohibited when issued by tax-exempt nonprofit purposes).

⁹ ASAE Petition for Stay, filed July 25, 2003.

¹⁰ See, e.g., Maryland Society of Association Executives Comments; Construction Management Association of America Comments, Pittsburgh Pediatric Society Comments, Albany County Convention and Visitors' Bureau Comments, American Correctional Association Comments.

¹¹ The National Association of Realtors (NAR) requests that the Commission stay the effective date of the Commission's rules at 64.1200(a)(3), 68.318 and other applicable rules "to permit NAR and its members sufficient time to review and comply with the Commission's new, unanticipated, and unprecedented, unsolicited fax rules." See NAR Request for Emergency Stay of Facsimile Advertisement Rules, filed August 1, 2003, p. 1.

¹² Proximity Marketing Request for Stay and Proximity Marketing Request for Expedited Clarification, filed August 6, 2003.

¹³ NABPAC Request for Stay of Facsimile Advertisement Rules, filed August 8, 2003.

¹⁴ The Chamber of Commerce of the United States, the Community Association Institute, the National Association of Manufacturers, the National Association of Wholesaler-Distributors, the National Restaurant Association, and the National Federation of Independent Business Request for Stay of Facsimile Advertisement Rules, filed August 8, 2003.

¹⁵ The American Society of Travel Agents, Mortgage Bankers Association of America, National Association of Mortgage Brokers, Consumer Mortgage Coalition, and the Midwest Circulation Association (collectively "Business Users Coalition") Petition for Emergency Stay, filed August 7, 2003.

American Business Media.¹⁶ A Petition for Emergency Stay & Clarification of the amended rules governing unsolicited facsimile advertisements as they apply to tax-exempt nonprofit organizations was submitted by the Air Conditioning Contractors of America (ACCA).¹⁷ A Request for Stay of those rules governing unsolicited fax advertising was filed by the American Dietetic Association (ADA).¹⁸ Reed Elsevier Inc. submitted a Motion for Stay of the effective date of the amended fax consent rule at 64.1200(a)(3)(i).¹⁹ The Newspaper Association of America (NAA) and the National Newspaper Association (NNA) filed a Petition for Stay of the Commission's amended rules on unsolicited facsimile advertisements.²⁰

4. The American Teleservices Association (ATA) has also submitted a Request for Expedited Stay of the Commission's revisions to the rules implementing the TCPA.²¹ The ATA requests that the Commission stay the revisions to the rules implementing the TCPA, pending a final decision on judicial review of the new rules. ATA's petition relates primarily to the new telephone solicitation rules, including the national do-not-call registry.

5. We now, on our own motion, issue this limited reconsideration of the effective date of our determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements, as well as the amended unsolicited facsimile provisions at 47 C.F.R. § 64.1200(a)(3)(i). Section 64.1200(a)(3)(i), as amended, requires the sender of a facsimile advertisement to first obtain from the recipient a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender.²² The comments filed after the release of the *Report and Order* indicate that many organizations may need additional time to secure this written permission from individuals and businesses to whom they fax advertisements. We believe that, in light of this new information, the public interest would best be served by allowing senders of such advertisements additional time to obtain such express permission before the new rules become effective. In addition, this extension will allow the Commission the opportunity to consider any petitions for reconsideration and other filings that may be made on this issue.²³ We retain the discretion to extend the effective date further should circumstances

¹⁶ American Business Media seeks "a stay pending reconsideration of [the requirement for written and signed permission], a stay pending clarification that notifications to subscribers of subscription expiration and insertion orders to advertisers are not advertisements, a stay for one year in the event that the Commission retains the signature rule and a stay pending judicial review." American Business Media Petition for Stay, filed August 6, 2003.

¹⁷ Air Conditioning Contractors of America (ACCA) Petition for Emergency Stay & Clarification, filed August 12, 2003.

¹⁸ American Dietetic Association Request for Clarification or, in the Alternative, A Stay of the Implementation of Regulations, filed August 6, 2003.

¹⁹ Reed Elsevier Inc. Motion for Stay, filed August 12, 2003.

²⁰ NAA and NNA Petition for Stay, filed August 8, 2003.

²¹ See ATA Request for Expedited Stay, filed July 25, 2003.

²² See 47 U.S.C. § 227(a)(4) for the definition of "unsolicited advertisement."

²³ Petitions for reconsideration are due on August 25, 2003.

warrant such an action.²⁴

6 We emphasize that the only effective dates of the Commission's *Report and Order* extended by this Order are: 1) the determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements; and 2) the requirement that the sender of a facsimile advertisement first obtain the recipient's express permission in writing. Therefore, until the amended rule at 47 C.F.R. § 64.1200(a)(3)(i) becomes effective on January 1, 2005, an established business relationship will continue to be sufficient to show that an individual or business has given express permission to receive facsimile advertisements. The effective date of our amended definition of an "established business relationship" is not affected by our determination here.²⁵

7. We have considered and rejected ATA's request to stay the revisions to the rules implementing the TCPA to the extent that such request extends beyond the fax rules discussed above. Although the Commission has declined to adopt a single standard for requests for injunctive relief, we generally consider four criteria: (1) the likelihood of success on the merits, (2) the threat of irreparable harm absent grant of preliminary relief, (3) the degree of injury to other parties if relief is granted, and (4) that a stay will be in the public interest.²⁶ We conclude that ATA's request does not satisfy the factors governing the issuance of a stay.

8. The actions contained herein have not changed our Final Regulatory Flexibility Analysis (FRFA), which is set forth in the *Report and Order*. Thus, no supplemental FRFA is necessary. In addition, the action contained herein imposes no new or modified reporting and/or recordkeeping requirements or burdens on the public.

9 Accordingly, IT IS ORDERED that, pursuant to Sections 1-4, 222, 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 222 and 227; and Section 1.108 of the Commission's Rules, 47 C.F.R. §§ 1.108, this Order on Reconsideration in CG Docket No. 02-278 IS ADOPTED and that the *Report and Order*, FCC 03-153, IS MODIFIED as set forth herein.

10. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the National Association of Realtors' Request for Emergency Stay IS DISMISSED without prejudice.

11. IT IS FURTHER ORDERED, subject to the extended effective dates set forth

²⁴ We emphasize that our existing TCPA rules prohibiting the transmission of unsolicited advertisements to a telephone facsimile machine will remain in effect during the pendency of this extension. Under these rules, those transmitting facsimile advertisements must have an established business relationship or prior express permission from the facsimile recipient to comply with our rules. In addition, the effective date of the other amended facsimile rules remains unchanged by this Order. See, e.g., 47 C.F.R. § 68.318(d) (amending the rules to require any fax broadcaster that demonstrates a high degree of involvement in the transmission of messages to be identified on the facsimile, along with the identification of the sender).

²⁵ *Report and Order* at para 113

²⁶ See *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958). See also *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, PR Docket No. 92-235, 15 FCC Rcd 7051, 7054 at para. 7 (1999).

above, that the American Society of Association Executives' Petition for Stay IS DISMISSED without prejudice.

12 IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that Proximity Marketing's Request for Stay IS DISMISSED without prejudice.

13. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the National Association of Business Political Action Committees' Request for Stay IS DISMISSED without prejudice.

14. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the Chamber of Commerce of the United States *et al.* Request for Stay IS DISMISSED without prejudice.

15 IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the Business Users Coalition's Petition for Emergency Stay IS DISMISSED without prejudice.

16. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the American Business Media's Petition for Stay IS DISMISSED without prejudice.

17. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the Air Conditioning Contractors of America's Petition for Emergency Stay IS DISMISSED without prejudice.

18. IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the American Dietetic Association's Request for Stay of the Implementation of Regulations IS DISMISSED without prejudice.

19 IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that Reed Elsevier Inc.'s Motion for Stay IS DISMISSED without prejudice.

20 IT IS FURTHER ORDERED, subject to the extended effective dates set forth above, that the Newspaper Association of America and the National Newspaper Association's Petition for Stay IS DISMISSED without prejudice.

21. IT IS FURTHER ORDERED, that the American Teleservices Association Request for Expedited Stay IS DISMISSED without prejudice to the extent it seeks a stay of the rules affected by the extended effective dates set forth above, but is OTHERWISE DENIED.

22 IT IS FURTHER ORDERED, that the effective date for the Commission's determination that an established business relationship will no longer be sufficient to show that an individual or business has given express permission to receive unsolicited facsimile advertisements and the requirement that the sender of a facsimile advertisement first obtain the recipient's express permission in writing, as codified at 47 C.F.R. § 64.1200(a)(3)(i), IS January 1, 2005, and that this Order on Reconsideration is effective upon publication in the Federal Register.²⁷

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁷ In light of the need to allow affected entities time to comply with the new faxing rules, we find good cause, pursuant to 5 U.S.C. § 553(d), to make this effective on less than thirty days' notice.